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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1015

LOCAL 189, UNITED PAPERMAKERS AND PAPERWORKERS, AFL–CIO, CLC; UNITED PAPERMAKERS AND PAPERWORKERS, AFL–CIO, CLC, PETITIONERS

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 18a–49a) is reported at 416 F. 2d 980. The opinion and order of the district court (Pet. App. 8a–17a) are reported at 282 F. Supp. 39.

JURISDICTION

The judgment of the court of appeals (Pet. App. 50a) was entered on July 28, 1969. The order of the court of appeals (Pet. App. 51a) denying petitioner's petition for rehearing and rehearing *en banc* was entered on October 1, 1969.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

At its Bogalusa, Louisiana, paper mill, the Crown Zellerbach Corp. (Crown) traditionally restricted the hiring of Negroes to lower-paying, menial jobs in Negro lines of progression and reserved the better-paying, more desirable jobs for white employees. In January, 1966, the Negro lines of progression were merged with white lines, so that Negro employees were for the first time given the opportunity to move by promotion into white jobs. But the lines were merged on the basis of rates of pay, so that virtually all-Negro jobs were placed below all of the white jobs, and virtually all Negro employees were treated as being junior to the most junior white employees. And under the "job" seniority system in effect, seniority for purposes of promotion was governed by the length of service in particular jobs. Thus, in competition for the better-paying, more desirable, traditionally white jobs, Negroes received no seniority credit for the time they had spent in the Negro jobs to which they had been assigned on the basis of their race; and no Negro employee, however well qualified, could compete for jobs with his white contemporaries.

The issue thus presented is:

Whether a seniority system which perpetuates the effects of past discrimination by preventing qualified Negro employees from competing on an equal basis with their white contemporaries for better-paying,

more desirable jobs, is lawful under Title VII of the Civil Rights Act of 1964, where there is available an alternative, feasible seniority system which does not produce such effects.

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

1. Section 703(a), 42 U.S.C. 2000e–2(a):

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> * * * * *
>
> (h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to em-

ployees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin * * *.

STATEMENT

This action was filed by the Attorney General, pursuant to authority granted him by Section 707(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–6(a), on January 30, 1968. The complaint alleged that Petitioners and the Crown Zellerbach Corporation (Crown) were engaged in racially discriminatory employment practices at Crown's Bogalusa, Louisiana, paper mill, in violation both of Title VII and of Crown's obligations as a government contractor under Executive Order 11246.

The complaint alleged, among other discriminatory practices, that the continued maintenance of a system of "job seniority," in the context of segregated seniority departments ("lines of progression"), operated to discriminate against Crown's Negro employees on account of their race. By agreement of the parties the issue raised by this allegation was severed from the remaining, related issues in the case and tried separately.

Upon a stipulation of facts and other evidence and arguments of counsel, the district court ruled on March 26, 1968, that Crown's "job seniority" system was unlawful, and ordered Crown to abandon that system and institute in its place a limited system of

"mill seniority."[1] On appeal by Crown and petitioners this order was affirmed by the Court of Appeals for the Fifth Circuit, and it is that action which petitioners would have this Court review.

The facts on which the district court based its opinion were largely undisputed. At the time this action was begun, Crown's Bogalusa, Louisiana, paper mill employed approximately 1,200 people of whom about 250 were Negroes. The company had traditionally maintained a racially segregated structure of job progression groups ("lines of progression"), with the higher-paying, more desirable jobs arranged in lines of progression which were reserved for white employees, and the remaining jobs restricted to Negro employees.[2] Under the seniority system agreed to between Crown and petitioners, a vacancy in any given job was normally filled by promoting the individual who had longest served in the job immediately below the vacant job in the line of progression.[3] In general, the highest-paying jobs in the lines of progression reserved for Negroes had lower rates of pay than the *entry-level* jobs in the "white" lines of progression. This combination—promotion based on

[1] The district court carefully limited the new system's application to situations where Negroes hired before the merger of the formerly segregated "lines of progression" were among those competing for a vacant job.

[2] This segregation was maintained by placing all jobs in "white" lines of progression within the bargaining jurisdiction of Petitioner Local 189, and all jobs in "Negro" lines within the jurisdiction of Local 189-A.

[3] This is admittedly a common seniority system, and is widely used in the paper industry. It is not, standing alone, inherently discriminatory, nor was any such contention made below or relied upon by the courts below.

job seniority, combined with segregated and discriminatory "lines of progression"—meant that Negroes could expect to progress only as far as the best-paying jobs in Negro "lines of progression," at which point they would generally be earning less money than would newly-hired whites.

Beginning in May, 1964 and continuing until after the effective date of Title VII, the structure described above was modified by Crown, with petitioners' concurrence, in several respects. First, on May 17, 1964, Crown and petitioners agreed to merge what had previously been segregated labor pools ("Extra Boards"). From that date forward newly-hired Negroes, who had previously been eligible to bid only into Negro lines of progression, were in theory eligible to bid into entry jobs in white lines of progression on the basis of "mill" seniority, that is, on the basis of total time worked with the company, ~~as were whites.~~ However this right was in fact diluted by the operation of contractually-created "recall rights," by which any employee who had worked a job temporarily had a right of first refusal to that job when it became permanently vacant, regardless of his seniority standing.

After July 2, 1965 (the effective date of Title VII with respect to Crown), but before this action was filed, two other contractual modifications of the pre-1964 system were made. Late in 1965 Crown, the petitioners, and Local 189-A reached agreement on a "transfer" arrangement under which—for the first time—an employee holding a job in any line of pro-

gression became eligible to bid for vacant entry jobs in other lines of progression without first returning to the "Extra Board" and re-establishing Extra Board seniority.

On January 16, 1966, after negotiations with the Equal Employment Opportunity Commission, Crown and the unions (including petitioners) reached an agreement which provided for the merger of certain white progression lines with functionally related Negro lines, with the merged group of jobs arranged in descending rate-of-pay order. The result of this was that, with two exceptions, all the Negro jobs in the mill were placed below the lowest-paying, entry level white jobs in the merged lines. Promotions within these lines continued to be determined in accordance with the contract "job seniority" system.

Under this merged arrangement, Negroes for the first time had theoretical access, by promotion, to some of the white jobs from which they had previously been excluded. However, this theoretical access was limited and largely frustrated by two provisions of the seniority system in effect. Under the "job" seniority system, eligibility for promotion within the formerly white lines of progression was calculated on the basis of previous time spent in white jobs, which had been denied to Negro employees because of their race. Thus, Negro employees, regardless of their qualifications and their years of service with Crown, were considered junior, for purposes of promotion, to a white employee who had only a month or two of service. The recall rights provision, as interpreted, further limited Negro opportunities; for it was inter-

preted to give white employees who had worked temporarily on a white job a "recall" right to that job above the rights of Negro employees with greater plant seniority, who were in jobs below it in the newly merged lines.

No other structural or contractual changes were made at the Bogalusa mill prior to the filing of this action.[4] As the mill was operated on January 30, 1968, most Negro employees were able, either by transfer or by promotion, to gain access to jobs formerly reserved for whites. Under the job seniority system, however, eligibility for promotion within formerly white lines of progression was calculated solely on the basis of previous time spent in the white lines, a commodity which had been denied to Negroes on account of their race. It was this effect of the job seniority system which the Attorney General's complaint attacked,[5] and which the district court and the court of appeals found unlawful.

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[4] Crown was, however, at the instance of the Office of Federal Contract Compliance, prepared to unilaterally change the job seniority system to a "job-plus-mill" (or A plus B) seniority system when the suit was filed. Crown's efforts to obtain petitioners' agreement to this change had been unavailing, and Petitioner Local 189 had responded to Crown's announced intention to make the change unilaterally by voting to strike. The threatened strike was temporarily restrained by the district court on January 31, 1968, on Application of the United States. Thereafter, on February 1, Crown implemented the "A plus B" seniority system.

[5] The complaint also attacked, by implication, the "A plus B" system, under which eligibility for promotion continued to depend in part on job seniority.

ARGUMENT

The courts below held that Crown's job seniority system, in a context where access to more desirable and better-paying jobs had been denied to Negroes on account of their race and where tenure in such jobs was the controlling requirement for promotion to higher jobs, constituted a present and future barrier to equal employment opportunities, and was therefore unlawful. The issue raised by the decisions below is a significant one, which will govern the employment practices of many employers in many sections of the country. However, the holding of the courts below follows inescapably from the premise upon which it is based—namely that seniority systems and other employment practices which, although racially neutral on their face, do in fact perpetuate the effects of past discrimination, are unlawful under Title VII of the Civil Rights Act of 1964. While at one time there was a divergence of views among the district courts, the holding and rationale of the courts below are in accord with all of the appellate decisions interpreting Title VII, and are plainly correct. Accordingly, further review by this Court is not warranted.

1. Petitioner contends that in enacting Title VII of the Civil Rights Act of 1964, Congress specifically intended to preserve all preexisting seniority rights, even those rooted in racial discrimination. But the Act clearly reveals a contrary purpose. For Section 703(a) makes unlawful any employment practice which would limit or classify "employees *in any way*

which would deprive or *tend to deprive* any individual of employment opportunities" because of race,[6] and Section 703(h) of the Act protects only bona fide seniority systems which are not intended to be discriminatory.[7] A seniority system which has its origins in racial discrimination and which perpetuates that discrimination into the future is not a bona fide system within the meaning of Section 703(h) (Pet. App. 43a). The legislative history on the point discloses merely a Congressional intent not to prefer *later* hired Negroes over *earlier* hired white employees.[8] As the court of appeals recognized (Pet. App. 43a–44a), its holding merely requires that Negro employees be given equal treatment for seniority purposes for the time they actually worked for an employer, not that they be given any preferential or artificial seniority credits. Furthermore, the legislative history discloses a Congressional intent "to eliminate * * * discrimination in employment based on race."[9] Thus, the courts below were clearly correct in holding that the law prohibits a job seniority system which perpetuates the effects of past discrimination by making virtually all Negro employees hired prior to January 1966, regardless of their qualifications and years of service, junior for purposes of promotion to each white employee who was hired subsequent to them but prior to that date.

2. Not only has the Court of Appeals for the Fifth Circuit applied this reading of Title VII to two other

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[6] Emphasis added, 42 U.S.C. 2000e–2(a).

[7] 42 U.S.C. 2000e–2(h).

[8] *E.g.*, 110 Cong. Rec. 7207, 7212–7215 (1964).

[9] H. Rep. No. 914, 88th Cong., 1st Sess. 26 (1963).

cases involving this issue,[10] but the same reading of the Act has been applied by the Court of Appeals for the Eighth Circuit,[11] and the district court opinion cited by petitioners as evidencing judicial disarray on the question, *Griggs* v. *Duke Power Company,* 292 F. Supp. 243 (M.D. N.C.) (Pet. 28–29), has now been reversed on the point for which petitioners cited it. In reversing in part, the Court of Appeals for the Fourth Circuit observed:

> [T]he district court also held that Title VII of the Civil Rights Act of 1964 does not encompass the present and continuing effects of past discrimination. This holding is in conflict with other persuasive authority and is disapproved.[12]

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[10] *Local 53, Asbestos Workers* v. *Vogler*, 407 F. 2d 1047 (C.A. 5); *United States* v. *Hayes International Corporation*, 415 F. 2d 1038 (C.A. 5).

[11] *United States* v. *Sheet Metal Workers, Local 36, et al.*, 416 F. 2d 123 (C.A. 8).

[12] *Griggs, et al.* v. *Duke Power Company* (C.A. 4, No. 13,013, January 9, 1970) (Slip Op., pp. 9–10). The court cited and quoted from the decision in the case at bar. *Id.*, pp. 10–11, p. 27.

While in his dissenting opinion in *Griggs*, Judge Sobeloff asserts that the opinion of the Fourth Circuit is in conflict with the decision of the Fifth Circuit in the case at bar (*id.*, p. 29), a reading of his opinion (see, *e.g.*, p. 30) as well as the majority opinion, makes it clear that he was referring to a conflict with the rationale of the decision at bar and that all of the judges on the *Griggs* panel agreed that the decision of the Fifth Circuit in the case at bar was correct, and that they unanimously followed it with respect to the seniority issue in *Griggs*. The judges on the panel in *Griggs* disagreed on what Judge Sobeloff described as the "analogous issue" (*id.*, p. 30), of educational standards and tests.

In *Quarles* v. *Philip Morris*, 279 F. Supp. 505 (E.D. Va.), Circuit Judge Butzner[13] analyzed the legislative history relating to Section 703(h), 42 U.S.C. 2000e–2(h), which contains the "bona fide seniority" language on which petitioners rely. His conclusion, in which the Fourth, Fifth, and Eighth Circuits have since concurred, was that:

> * * * Congress did not intend to require "reverse discrimination"; that is, the Act does not require that Negroes be preferred over white employees who possess employment seniority. It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act.[14]

The courts below, in reaching the same conclusion, found upon uncontroverted evidence that Crown and petitioners had formerly restricted Negroes to low-paying jobs, and that the present competitive disadvantage at which Negroes bidding under the "job seniority" system found themselves was the result of that prior discrimination.

The courts below also followed the decisions of this Court and other courts in related contexts in holding unlawful practices which appear neutral on their face but which in fact tend to perpetuate the effects of past discrimination. *E.g., Guinn* v. *United States*, 238 U.S. 347, 363–365; *Lane* v. *Wilson*, 307 U.S. 268, 275; *Goss* v. *Board of Education*, 373 U.S. 683; *Louisiana* v. *United States*, 380 U.S. 145; *Gaston County, North Carolina* v. *United States*, 395 U.S. 285.

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[13] Sitting by designation in the district court.

[14] *Quarles* v. *Philip Morris*, *supra*, at 516.

Petitioners concede that the construction of Section 703(h) which they urge would have precisely the "freezing" effect which Judge Butzner foresaw. We submit that the *Quarles* analysis of the legislative history convincingly demonstrates that Congress did not intend any such effect, and that the courts which have followed *Quarles* in rejecting that construction, including the courts below in this case, as well as the Courts of Appeals for the Fourth and Eighth Circuits, are clearly correct.

CONCLUSION

For the foregoing reasons the petition should be denied.

Respectfully submitted.

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